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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 59.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

against

D. F. AND T. C. RANKIN, DEFENDANTS IN ERROR.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

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ISAAC G. PHILLIPS,
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EDWARD COLSTON,
Of Counsel.

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vs.

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SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

May it please the Court:

The question of liability in this case depends entirely on the question as to whether or not the common-law liability of common carriers was modified by the Carmack Amendment or the contract of shipment.

We have been able to find no discussion of the question of liability under the Carmack Amendment by this court except the opinion of Mr. Justice Lurton in the *Croninger* case (226 U. S., 491).

Adversary counsel insist that the language of Mr. Justice Lurton in that opinion shows that this court holds the common-law liability of carriers to be still in force. The language referred to is as follows:

> "The liability thus imposed is limited to 'any loss, injury, or damage caused by it or a succeeding carrier to whom the property may be delivered;' and plainly implies a liability for some default in its common-law duty as a common carrier."

Counsel fail to distinguish between the terms "duty" and "liability."

At common law common carriers were absolute insurers against all loss except that caused by the act of God or a public enemy. (And except for the negligence of the shipper or inherent nature of the goods.)

Of course, there are many "duties" imposed on carriers at common law and these duties are still imposed.

It is well settled that carriers could contract against their common-law liability as insurers.

It is equally well settled that carriers are not permitted to contract against liability for their negligence. In other words, a carrier may not contract against its liability for loss resulting from a "default in the performance of its duties" as a carrier.

So, under the Carmack Amendment, it was expressly provided that the carrier must be liable for loss "caused by it."

This could not mean that the carrier was to be liable as an insurer. The liability of insurers does not grow out of any act "caused by them." Nor on account of any "default in the performance" of any duty.

By the common law a carrier was liable for "unavoidable loss or damage, though due to uncontrollable forces;" such as fires over which they had no control, and acts of trespassers and other forces which the carriers could not prevent and which are in no manner "caused by" said carriers—and which did not grow out of any default or neglect on their part.

Obviously, Mr. Justice Lurton was correct in holding that under this act the carrier was not responsible as an insurer nor liable for "unavoidable loss or damage, though due to uncontrollable forces."

We submit that the construction of this act by this court in the *Croninger* case should be followed rather than that of the Court of Appeals of Georgia in the case of Railroad *vs.* Warfield, 6 Georgia App. Reports, 553-4, cited by adversary counsel.

In that case the Georgia court said:

> "When used of a person or other subject charged with an affirmative duty of care and diligence, or of good conduct so to speak, the word 'caused' implies not only active misconduct and deeds of commission, but also passive neglect, deeds of omission, and failures to exercise duties faithfully."

This may be true, but the common-law liability of a carrier was not confined to "misconduct and deeds of commission," nor "passive neglect, deeds of omission, and failures to exercise duties faithfully," and herein lies the distinction between the carrier's liability under the common law and under the Carmack amendment.

Again, the Court of Appeals of Georgia say:

> "Any injury that a common carrier permits to befall the property while in its custody, otherwise than through the act of God or the public enemy is in a juridic sense caused by it."

Here the court is in direct conflict with the clear statement of the rule in the *Croninger* case that the expression "caused by it" precludes the idea of a liability for loss resulting from "uncontrollable forces."

It is obvious that Congress intended to modify the common-law liability of carriers in such cases.

The modern tendency of legislation has been in that direction.

1st Hutchinson on Carriers, secs. 344-389.

The liability of carriers by water was modified by the Harter Act in 1893. A similar statute was enacted in Great Britain in 1900.

1st Hutchinson on Carriers, sec. 346.

The courts now permit carriers to contract against liability as insurers, but *not* against their liability for negligence.

Hutchinson on Carriers, vol. 1, sec. 388.
Hart *vs.* Penn. Railroad, 112 U. S., 330.

In other words, carriers, even before the passage of this act, might contract against their common-law liability as insurers, but they could not contract against liability for any loss "caused by" them.

They could not contract against loss resulting from their negligence, that is to say, any "default in their common-law duty as carriers."

Adversary counsel insist that the loss in question was caused by the negligence of the company's engineer and other servants. We have discussed the facts in our original brief and we submit that adversary counsel are in error. However that may be, the question was not properly submitted to the jury.

On the contrary, the court told the jury that "the carrier is held to the *highest degree of care* for the safe transportation of the animals."

The Tennessee Court of Appeals could only defend this charge on the ground that the common-law liability of carriers as insurers was not changed or modified by the Carmack amendment. It has been often held by this court that where the common-law liability of the carrier was waived by contract such carrier was liable only for a breach of its duty to exercise ordinary care to protect freight from loss in transportation.

Railway Company *vs.* Reeves, 77 U. S., 176.
U. S. Express Co *vs.* Kountze, 75 U. S., 342.
Holladay *vs.* Kennard, 79 U. S., 254.
1st Hutchinson on Carriers, sec. 292.
2d Hutchinson on Carriers, sec. 667.

Clause 10 in the bill of lading sued on in this cause expressly provides that the company shall not be liable for loss or damage "from any cause whatsoever beyond said carrier's control" (R., p. 8).

So that the charge of the trial court was erroneous both under the Carmack amendment and under the contract of the parties. The error in this charge was properly taken advantage of in the trial court and in the Tennessee appellate courts (R., pp. 18, 20, 78, 121, 181, 182).

Limited Valuation.

Pleadings:

Adversary counsel cite no authorities and offer no argument to controvert our insistence that it will be presumed that the carrier has complied with the law and filed its schedule of rates with the Interstate Commerce Commission. It is insisted, however, that the company in this case pleaded the fact that it had filed its schedule of rates with the Interstate Commerce Commission, and that the filing of these pleas destroyed the ordinary presumption and placed the burden upon the carrier to sustain the pleas by proof.

This insistence grows out of a misconception of the pleas that were filed in this case.

The first plea of "not guilty" traversed the allegations of negligence in the declaration.

The second plea is a denial of the breach of the contract set out in the declaration.

The third plea is as follows:

> "For further plea defendant denies that any part of the contract of shipment filed as Exhibit 'A' to the plaintiffs' declaration is void for any reason, but says that said contract is valid and binding and pleads the same as a complete bar to plaintiffs' right to recover in excess of $75.00 per head for such mules as may have been killed or injured in the course of said shipment" (R., p. 11).

This plea directly put in issue the averment of the declaration in which it was insisted that the limited-valuation clause in the bill of lading was illegal and void.

This made a direct issue under which the burden was upon the defendants in error to sustain the averments of their declaration and show that the limited-valuation clause was illegal for some of the reasons set out therein.

We do not think the burden of proof was upon the railroad under any of the pleas filed, but assuming that the burden was upon the company in so far as the other pleas are concerned, this would not affect the question at issue.

In the case of Shelby County *vs.* Bickford, 102 Tenn., that court say (at page 407):

> "It is insisted, however, that inasmuch as the defendant did not plead *non est factum*, demur, or crave over, and did plead covenants performed and went to trial on such issue, he waived the objection this assignment of error raises. It is true, a plea of covenants performed, under our decisions, admits the covenants to be as set out in the declaration. Steele *vs.* McKinnie, 5 Yer., 449; Governor *vs.* Organ, 5 Hum., 131. Under these authorities, if the plea of covenants performed stood alone, and was the only defense set up by plea of defendant, it would have been unnecessary to prove the making of covenants. But this was not the only plea of the defendant. The first plea pleaded was that 'He did not undertake, agree or covenant as the plaintiff hath in its declaration alleged.' The second plea says 'He does not owe the plaintiff anything on the deed or covenants, or on account of any matters or things whatever alleged or set forth in the declaration.' These, and other pleas of the twenty filed, negative the allegations of the declaration as to execution of the deed and covenants sued on. Each of these separate pleas made a separate and distinct defense, and were not waived by anything set up or conceded by the legal effect of the pleading itself in any other separate and distinct plea. Defendant may plead as many pleas as he has real grounds of defense. Code No. 4328 (S.). These pleas may be inconsistent—as, a defendant sued as

executor may plead *ne unques* executor, *non est factum*, or a defendant sued for slander may plead not guilty, statute of limitations, and justification. Langford *vs.* Frey, 8 Hum., 443; Kelly *vs.* Craig, 9 Hum., 215."

Under this well-settled rule the burden of proof may be upon the plaintiff under some of the pleas and upon the defendant under others.

If, as insisted by adversary counsel, the mere allegation in the plea, that the carrier had complied with the law and filed its schedule of rates with the Interstate Commerce Commission, placed the burden upon the said carrier to sustain this averment, it is clear that this would apply alone to pleas in which such averment is contained.

Before a plaintiff can make out his case he must sustain the allegations of his declaration, and show affirmatively that he is entitled to recover *as against each plea interposed by the defendant*. An admission in one plea will not aid the plaintiff as against another plea. For instance, in slander cases, if the defendant pleads justification alone, the plaintiff is not required to prove the slanderous words averred; but if the defendant pleads not guilty in one plea and justification in another, plaintiff must prove the utterance of the slanderous words alleged in order to be entitled to recover as against the plea of not guilty.

So, in the case at bar, the defendant in error sues for the breach of a contract, but in his suit insists that a certain provision of that contract is not binding for certain reasons therein particularly specified. It is not insisted nor intimated in the declaration that the contract is void because of the failure on the part of the carrier to file same with the Interstate Commerce Commission. Presumably, when a pleader sets up specific reasons why such a contract is void, he will set up all the reasons why such a contract is void.

The plaintiff in error, in the fourth plea, traversed the allegations of the declaration with reference to the invalidity of the contract in so far as it was insisted that said contract

was rendered invalid under the laws of the State of Kentucky (R., p. 11).

The fifth plea, in express terms, traversed all the other averments of the declaration with reference to the invalidity of the contract (R., p. 12).

Hence, under the allegations of the declaration and these pleas thus set out, the issue was squarely made as to whether the limited valuation clause was invalid for any of the reasons specifically pointed out in the declaration.

Neither in the declaration nor in any of these three pleas is the question as to whether or not the rate set up in the contract had been filed with the Interstate Commerce Commission made. So that, under *these pleas*, we get back to the question of the ~~burden of proof~~ presumption.

A plaintiff cannot attack the validity of a contract on certain specified grounds, and having failed to sustain any of these grounds, have the case decided in his favor *on a presumption* that his adversary had failed to do that which the law required him to do. We think that such a holding violates the well-settled rules of pleading as well as the established rules of evidence that we have hereinbefore insisted upon.

A provision in section 6 of the Hepburn act, as amended June 29, 1906, provides as follows:

> "No carrier, unless otherwise provided by this act shall engage or participate in the transportation of passengers or property, as defined in this act unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act."

Under section 10 a violation of this provision is a misdemeanor and subjects the carrier violating same to a heavy fine.

In addition to the cases cited in our original brief we call the court's attention to the recent cases of Geraity *vs.* Atlantic Coast Line Railway Company, 211 Federal Reporter, 227.

Suit was brought in that case to recover for unreasonable and excessive charges for interstate transportation. The declaration made no reference to the filing of the rates with the Interstate Commerce Commission. The defendant company demurrer. It will thus be seen that the issue raised under the pleas in that case were exactly the same as raised in the case at bar under the third, fourth, and fifth pleas, so far as the filing of the schedule of rates with the Interstate Commerce Commission is concerned.

The court say:

> "The presumption is that the defendant carrier has obeyed the law and filed and published its rates. Unless otherwise held by the Interstate Commerce Commission such rates must be held *prima facie* reasonable and so treated by the courts."

The demurrer was sustained and the suit dismissed.

Limited Valuation Clause Valid Regardless of This Presumption:

It must be remembered that the limited valuation clause in the bill of lading is not attacked on the ground that it was not filed with the Interstate Commerce Commission, but upon other grounds discussed in our original brief, none of which are good under the decisions of this court.

The only question, then, is whether or not the rights of the parties are governed by the Carmack amendment or the rules established by the courts of Tennessee prior to the passage of that amendment. Adversary counsel insist that we are seeking an "exemption" under the Interstate Commerce Act.

There is no exemption from liability either under the Interstate Commerce Act or Carmack amendment, and of course we are insisting upon none.

We simply insist that under the terms of the Carmack amendment the liability of carriers for freight lost or injured in interstate shipment is controlled by the provisions of that

amendment. Our insistence is that the Carmack amendment controls the liability of interstate carriers, regardless of whether or not the shippers have complied with the Interstate Commerce Act.

If this is true, then the rights of the parties in this case must be controlled by the decisions of this court and not by the decisions of the courts of Tennessee.

Under the uniform rules established by this court the limited valuation clause is valid, and if there is any liability at all it can only be for the amount fixed in that clause.

Adversary counsel insist that the limited valuation clause is illegal because the shipper was not offered two rates, that is, he was not offered the opportunity to ship at an increased valuation by paying another rate.

The bill of lading expressly provides the shipper might declare an increased valuation and that for every increase of 100 per cent in the valuation fixed in the bill of lading there should be an increase of 50 per cent in the freight rate. This court held in the case of Railroad Company *vs.* Harriman, 227 U. S., 670, that this was a sufficient offer of two rates.

Again, it is insisted that the valuation was not fixed by the shipper in this case and that he was not asked to fix a valuation. This very question was passed on in the *Harriman case, supra.* In that case the court say:

> "In the case at bar it has been said that the shipper was not asked to state the value, but only signed the contract handed to him and made no declaration. But the same point was made in the *Hart* case when the court said:
>
> " 'A distinction is sought to be drawn between a case where a shipper, on requirement, states the value of the property, and a rate of freight is fixed accordingly, and the present case. It is said, that, while in the former case the shipper may be confined to the value so fixed, in the event of a loss by negligence, the same rule does not apply to a case where the valuation inserted in the contract is not a valuation pre-

viously named by the shipper. But we see no sound reason for this distinction. The valuation named was the agreed valuation, the one on which the minds of the parties met, however it came to be fixed, and the rate of freight was based on that valuation, and was fixed on condition that such was the valuation, and that the liability should go to that extent and no further.'"

Respectfully submitted,

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